Office-Supreme Court, U.S.
FILED
APR 15 1965
JOHN F. DAVIS, CLERK

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1964.

No. 1068

I-T-E CIRCUIT BREAKER COMPANY,
Petitioner,

v.

CITY OF PHILADELPHIA, et al.,
and
HONORABLE JOSEPH S. LORD, III, District Judge,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR ALLOWING THE WRIT	7
I. The Decision Below Presents Important Procedural Issues Affecting the Administration of Justice and the Construction and Operation of 28 U. S. C. § 1404(a) in Common Disaster, Antitrust and Other Litigation Giving Rise to Related Civil Actions in More Than One District	7
II. The Decision Below Conflicts With Decisions of This Court	13
III. The Decision of the Court of Appeals Refusing to Issue the Writ of Mandamus Conflicts With Decisions of This Court	13
CONCLUSION	14
APPENDIX A—List of Respondents	15
APPENDIX B—District Court's Order to Show Cause	17
APPENDIX C—District Court's Order Transferring Cases	19
APPENDIX D—Court of Appeals' Order Denying Petition	21

TABLE OF CASES CITED.

	Page
Continental Grain Co. v. Barge FLB-585, 364 U. S. 19 (1960)	9, 12
Ex parte Collett, 337 U. S. 55 (1949)	10, 13
Gulf Oil Corp. v. Gilbert, 330 U. S. 501 (1947)	11
Hoffman v. Blaski, 363 U. S. 335 (1960)	13
Keller-Dorian Color-Film Corp. v. Eastman Kodak Co., 88 F. Supp. 863 (S. D. N. Y. 1949)	9
Mazinski v. Dight, 99 F. Supp. 192 (W. D. Pa. 1951)	9
Norwood v. Kirkpatrick, 349 U. S. 29 (1955)	2, 11, 13
Platt v. Minnesota Mining Co., 376 U. S. 240 (1964)	14
Rapp v. Van Dusen, No. 14927, 3d Cir., December 16, 1964, *petition for rehearing granted*, April 6, 1965	6
United States v. National City Lines, 337 U. S. 78 (1949)	10, 13
Van Dusen v. Barrack, 376 U. S. 612 (1964)	10, 12, 14

STATUTES AND RULES CITED.

	Page
Clayton Act, § 4, 15 U. S. C. § 15	3
Federal Rule of Criminal Procedure 21(b)	10
Judicial Code, 28 U. S. C.:	
§ 1254(1)	2
§ 1292(b)	13
§ 1404(a)	2, 7, 10, 11, 12, 13, 14
§ 1406(a)	10
Supreme Court Rule 19(1)(b)	12
46 U. S. C. § 742	10

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No. .

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v.

CITY OF PHILADELPHIA, ET AL.

AND

HONORABLE JOSEPH S. LORD, III, DISTRICT JUDGE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, I-T-E Circuit Breaker Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW.

There are no opinions below. The order of Chief Judge Thomas J. Clary directing the parties to show cause why 17 civil actions should not be transferred from the Eastern District of Pennsylvania to the Northern District of Illinois and the order of respondent District Judge Joseph S. Lord, III,[1] directing such transfer are printed in Appendices B and C to this petition. The order of the Court of Appeals for the Third Circuit denying I-T-E's petition for either a rule to show cause or a writ of mandamus is printed in Appendix D to this petition.

1. The other respondents are listed in Appendix A to this petition.

JURISDICTION.

The order of the Court of Appeals denying the petition for either a rule to show cause or a writ of mandamus was entered on March 26, 1965 (Appendix D). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). *Norwood v. Kirkpatrick,* 349 U. S. 29, 30 (1955).

QUESTIONS PRESENTED.

1. Where there is not and could not be a finding that the transfer is "for the convenience of parties and witnesses," as authorized by § 1404(a) of the Judicial Code, may a district court, on its own motion, transfer civil actions properly before it to another district, saying merely that the transfer is "in the interest of justice" and "to facilitate" the disposition of these and other civil actions brought by other plaintiffs against the same defendant in the transferee district?

2. Should not the court of appeals issue a writ of mandamus to correct the district court when it exceeds its jurisdiction, errs in interpreting the legal limitations upon and criteria for a transfer under § 1404(a) of the Judicial Code, and ignores the mandatory statutory standards by entering, upon its own motion, an order transferring civil actions properly before it to another district when there is not and could not be a finding that such transfer is "for the convenience of parties and witnesses"?

STATUTE INVOLVED.

Section 1404(a) of the Judicial Code, 28 U. S. C. § 1404(a), provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE.

Petitioner, I-T-E, is a defendant in 17 antitrust treble-damage actions brought by 32 private and governmental utilities in the United States District Court for the Eastern District of Pennsylvania at Philadelphia pursuant to § 4 of the Clayton Act, 15 U. S. C. § 15 (29a-30a [2]). The respondents are the utilities more specifically identified in Appendix A to this petition, and District Judge Joseph S. Lord, III.

The complaints in these cases were filed after the 1959-60 federal grand jury investigation of the electrical manufacturing industry in that district, which plaintiffs expressly pleaded in their complaints (25a-26a). In these cases the plaintiffs' claims are presently limited to those based on purchases from I-T-E of electrical equipment known as power switchgear assemblies.[3]

I-T-E is a Pennsylvania corporation with its principal place of business in Philadelphia (25a). Its Switchgear Division, which manufactures and sells power switchgear assemblies, is in Philadelphia. Thus Philadelphia is the source of virtually all I-T-E's relevant documents and personnel with knowledge relevant to these actions, including those who would be witnesses at the trial. So also the City of Philadelphia, the Philadelphia Gas Works, the Philadelphia Electric Company and the United Gas Im-

2. References to "a" pages are to the appendices to the petition for either a rule to show cause or a writ of mandamus in the court of appeals.

3. Federal Pacific Electric Company, which has its principal place of business in Newark, New Jersey, is also a defendant but the plaintiffs did not purchase any power switchgear assemblies from Federal Pacific (29a-30a). Although the plaintiffs purchased power switchgear assemblies from former defendants in these cases with whom they have settled, under the terms of their settlements the plaintiffs do not claim damages from I-T-E on such purchases (61a). It appears that 22 of the plaintiffs made no purchases from I-T-E and their attorney has stated their intention to dismiss their claims. This should ultimately result in the dismissal of nine of these seventeen actions.

provement Company, whose claims involve five-sixths of the sales dollars in these actions, have all their personnel and records in Philadelphia. The remaining plaintiffs are scattered in other parts of the nation (30a, 10a-11a).

On February 9, 1965, without prior notice to the parties, the United States District Court for the Eastern District of Pennsylvania, *sua sponte*, by Chief Judge Clary, entered an order directing the parties to show cause why the 17 civil actions which are the subject of this petition should not be transferred to the United States District Court for the Northern District of Illinois (Appendix B). The rule was returnable February 19, 1965 before Judge Lord. The reasons for the transfer suggested in the rule were:

> ". . . it appearing that all of the cases in the above category in this District have been settled as against every defendant except Federal Pacific Electric Company and I-T-E Circuit Breaker Company, and it further appearing that several cases involving this category have been set for trial in the Northern District of Illinois for May 1, 1965, and that it would facilitate the national disposition of these cases to transfer them to the Northern District of Illinois to be either consolidated with the cases there set for trial or for trial immediately thereafter, and the Court having ascertained that the United States District Court for the Northern District of Illinois is agreeable to such transfer, IT IS NOW ORDERED, ADJUDGED AND DECREED that all plaintiffs and the above named defendants show cause, if any they have, why the above entitled actions should not be so transferred to the Northern District of Illinois."[4]

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4. At the time Chief Judge Clary's order was entered, there were in Chicago five cases allegedly based upon purchases of similar equipment which had been commenced there (26a) and two such cases had been ordered transferred there from Kansas City by the District Court for the Western District of Missouri (28a). A petition for

I-T-E filed a memorandum and affidavit opposing the proposed transfer (5a-24a, 25a-49a). Among other things, I-T-E urged the district court to consider the absence of witnesses in Chicago, the presence of parties, witnesses and records in Philadelphia and the difficulties and added expense which would be presented by the proposed transfer in preparation and trial not only of the Philadelphia cases but of the cases already in Chicago (10a-18a, 25a, 27a, 29a-30a).[5]

Plaintiffs filed a memorandum saying merely that they did not object to the proposed transfer (50a-51a).

After argument on February 19, Judge Lord entered an order on February 23 directing the transfer of all 17 civil actions (Appendix C). The order stated:

> ". . . it appearing that all of the cases involving power switchgear assemblies have been settled as against every defendant except Federal Pacific Electric Company and I-T-E Circuit Breaker Company, and it further appearing that several cases involving this category have been set for trial in the Northern District of Illinois for May 3, 1965, and that it would facilitate the national disposition of these cases to transfer them to the Northern District of Illinois to be either consolidated with the cases there set for trial or for trial immediately thereafter, and it further appearing, after the filing of briefs and after argument heard thereon, that it is in the interest of justice that said cases be transferred to the United States District

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writ of mandamus to vacate that order was dismissed by the Court of Appeals for the Eighth Circuit on March 29, 1965.

Since the entry of Chief Judge Clary's order, one of the cases originally commenced in Chicago has been dismissed, three cases have been transferred to Chicago by the District Court for the Southern District of Texas, and one case has been transferred to Chicago by the District Court for the Western District of Kentucky. The trial date has also been changed from May to October, 1965.

5. In the district court Federal Pacific also opposed transfer. However, it took no further steps with respect to the matter in the court of appeals.

> Court for the Northern District of Illinois, and the Court having ascertained that the United States District Court for the Northern District of Illinois is agreeable to such transfer, IT IS ORDERED that the above cases be and they hereby are transferred to the United States District Court for the Northern District of Illinois."

The district court did not purport to find that the transfers were "for the convenience of parties and witnesses", nor did it refer to the affidavit filed by I-T-E in response to the order to show cause, which indicates the inconvenience to parties and witnesses and the added expense that such a transfer would cause. There was no other evidence on this subject in the record on the order to show cause.

I-T-E moved the district court to certify its decision for interlocutory appeal under § 1292(b) of the Judicial Code (56a-58a). The motion was denied on March 16, 1965. Thereafter, on March 18, 1965, I-T-E filed with the court of appeals a petition for either a rule to show cause or a writ of mandamus.[6] On March 26, 1965 the court of appeals denied the petition without indicating its reasons for doing so (Appendix D).

On March 30, 1965 the district court entered an order staying transfer pending the filing of a petition for certiorari with this Court and action of this Court on an application to it seeking a further stay.

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6. The alternative form of the petition in the court of appeals is a result of a new procedure announced by that court in *Rapp v. Van Dusen,* No. 14927, 3d Cir., December 16, 1964, *petition for rehearing granted,* April 6, 1965.

REASONS FOR ALLOWING THE WRIT.

I. The Decision Below Presents Important Procedural Issues Affecting the Administration of Justice and the Construction and Operation of 28 U. S. C. § 1404(a) in Common Disaster, Antitrust and Other Litigation Giving Rise to Related Civil Actions in More Than One District.

Problems created by related multiple district litigation recur with increasing frequency as the activities of the country's businesses and citizens acquire a national character, no longer limited by purely local or regional considerations. There is ever-greater use of mass interstate transportation and national distribution of goods and dissemination of ideas. These and other changes in the life of the nation are reflected in the business of the courts. One aspect of such change is the frequency with which a single event or course of conduct gives rise to many lawsuits in different judicial districts presenting varying numbers of common or related issues of fact and law. An airplane crash, a train wreck, a ship collision, or an explosion may spawn many cases in several different district courts. The sale of a harmful drug by a national pharmaceutical manufacturer may result in scores of cases in more than a dozen districts. An indictment for a violation of the antitrust laws allegedly affecting sales in a national market may be the occasion for the commencement of hundreds of more or less related cases in almost every judicial district of the nation. The case at bar arises out of just such an event, and involves a small number of a great many treble-damage suits that have been brought by numerous purchasers of electrical equipment.

The district court in Philadelphia has directed the transfer to Chicago of some of the private treble-damage actions that were brought in Philadelphia by Philadelphia

plaintiffs against a Philadelphia defendant for damages allegedly sustained from the purchases in Philadelphia of equipment manufactured in Philadelphia, all of which are said by plaintiffs to have been the object of an antitrust conspiracy investigated and prosecuted in the federal court in Philadelphia.

The absence of any opinion from the district court explaining the consideration, if any, accorded by it to the factors customarily considered in measuring the "convenience of parties and witnesses", the absence of any finding in the district court's order that the transfers were "for the convenience of parties and witnesses", and the facts and circumstances of the cases themselves fairly permit, if not compel, the conclusion that the district court not only did not but could not find the transfers to be "for the convenience of parties and witnesses". Support for this conclusion is also provided by the entry of the order in 17 cases notwithstanding the widely varying geographical locations of the plaintiffs (see Appendix A), the expressed intention of plaintiffs' counsel that he would dismiss nine of the cases when he got around to it (64a-65a, 61a), and the district court's earlier express recognition of the obvious futility of transferring cases that will be dismissed.[7] From all that appears, the location of the plaintiffs was immaterial to the district court. The civil action brought by Webster City, Iowa, was dealt with no differently than the civil actions brought by the plaintiffs located in Philadelphia, which had by far the largest claims. Nor could the district court find that the convenience of the parties has been served by the transfer of all of their cases to Chicago. Even after transfer, these plaintiffs still would have pending against I-T-E in Philadelphia 37 cases based upon purchases of electrical equipment other than power

7. At the argument, the district court said, "You will get around to it but it would be rather futile to transfer these nine cases if we decide upon transfer—" (65a).

switchgear assemblies and, in addition, I-T-E still would remain as a defendant in Philadelphia in another power switchgear assembly case brought by two other plaintiffs whose case is unaffected by the orders of the courts below (11a, 18a).

The district court purports to justify its order not by a finding of convenience of parties and witnesses, which this Court declared to be the proper practice in *Continental Grain Co. v. Barge FLB-585*, 364 U. S. 19, 26 (1960), but by a bare statement that the transfer is "in the interest of justice". So far as appears from the district court's order, this conclusion is based upon an imprecise belief that some other cases brought by some other plaintiffs against the same defendant are approaching trial in some other district, upon the district court's speculation that the transfer of the Philadelphia cases somehow "would facilitate [their] national disposition", and upon the agreement of the transferee court to accept the cases.[8]

Thus this case squarely presents the issue whether, within the existing statutory authority, the convenience of the judges of the district courts in the disposition of related civil actions in different districts can be the controlling reason[9] for transferring such cases from one district court to another without regard to the convenience of parties and witnesses, or whether this novel procedural device may be

8. The order directing transfer is almost identical with the order to show cause entered by Chief Judge Clary and does not reflect any consideration of the affidavit, memorandum and argument in opposition to transfer presented to the district court. By the procedure adopted in this case, a rule to show cause on the court's own motion, the burden of showing that "the convenience of parties and witnesses" would be served by the transfer, which is normally that of the party seeking it, becomes instead a presumption of fact which the parties must overturn in order to avoid having a transfer thrust upon them.

At the argument, Judge Lord said Chief Judge Clary had spoken with District Judge Edwin A. Robson, of the Northern District of Illinois, about his willingness to accept the cases (62a).

9. Contrary to existing authority, *Keller-Dorian Color-Film Corp. v. Eastman Kodak Co.*, 88 F. Supp. 863, 866-7 (S. D. N. Y. 1949), *Mazinski v. Dight*, 99 F. Supp. 192, 194 (W. D. Pa. 1951).

employed only for the purposes stated in the statute which created it, "the convenience of parties and witnesses, in the interest of justice".

Section 1404(a) authorizes the transfer of a civil action to another district where it might have been brought only "for the convenience of parties and witnesses, in the interest of justice", and without that authority such a transfer could not be made.[10]

The Reviser's Note, which this Court has repeatedly adopted as "obviously authoritative in perceiving the meaning" of this section of the Judicial Code,[11] makes plain the reason for the section and the standards to be applied under it:

> "*Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper.* As an example of the need of such a provision, see Baltimore & Ohio R. Co. v. Kepner, 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. *The new subsection requires*

10. The limiting character of the standard of "convenience of parties and witnesses" is emphasized by the fact that Congress and this Court have omitted it from statutes and rules which invest the district court with broader powers to transfer cases in other specific situations. For example: 28 U. S. C. § 1406(a) authorizes transfer "in the interest of justice" of a civil action brought in the wrong district; 46 U. S. C. § 742 authorizes transfer of certain suits in admiralty against the United States "in the discretion of the court"; and Federal Rule of Criminal Procedure 21(b) authorizes transfer of some criminal cases, upon motion of the defendant, "in the interest of justice". Moreover, the Co-ordinating Committee for Multiple Litigation, which includes Chief Judge Clary (E. D. Pa.) and District Judge Robson (N. D. Ill.), is presently seeking an amendment to § 1404 specifically to permit the centralization of multiple district civil litigation for at least pretrial purposes.

11. *United States v. National City Lines*, 337 U. S. 78, 81, 82 (1949); *Ex parte Collett*, 337 U. S. 55, 68-71 (1949); *Van Dusen v. Barrack*, 376 U. S. 612, 634-5, n. 30 (1964).

> *the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so.*" (Emphasis supplied.)

The doctrine of *forum non conveniens,* in accordance which which § 1404(a) was drafted, took into account not only public interests, such as the imposition of jury duty "upon the people of a community which has no relation to the litigation", but the private interest of the litigant, which this Court recognized as "the one likely to be most pressed". Among the "important considerations" were "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Gulf Oil Corp. v. Gilbert,* 330 U. S. 501, 508-9 (1947).

The decisions by this Court since the adoption of § 1404(a) hold "the convenience of parties and witnesses" to be the indispensable condition of transfer, just as such considerations were the heart of the doctrine of *forum non conveniens.* Thus in *Norwood v. Kirkpatrick,* 349 U. S. 29, 32 (1955), this Court held that the adoption of § 1404(a) did not change the applicable criteria and still made inconvenience of the parties in the district where suit was brought the basic reason for a transfer to a district which was more convenient for them and the witnesses:

> ". . . we believe that Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience. This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader."

See also *Continental Grain Co. v. Barge FBL-585*, 364 U. S. 19, 21 (1960), where "the interest of justice" is equated with "unnecessary inconvenience and expense to parties, witnesses, and the public."

From the statutory language itself, as amplified by the Reviser's Note and the decisions of this Court, it has heretofore been essential to any transfer under § 1404(a) that there be a finding by the district court that the transfer is necessary "for the convenience of parties and witnesses". Only thereafter does the district court have to make the additional finding that the proposed transfer is also "in the interest of justice".[12]

The decisions of the courts below unsettle the law under § 1404(a) applicable to the transfer of related cases pending in several districts. In such cases, under the theory of the courts below, the express and well-defined statutory standard of "convenience of parties and witnesses", if it remains at all, is to be subordinated to the more general test of "the interest of justice", which may be met without regard, or even contrary, to the convenience of parties and witnesses. Such a far-reaching procedural change, susceptible of non-uniform application not only to future cases but to hundreds of cases now pending, should be considered by this Court before the practice promulgated by the decisions of the courts below spreads throughout the judicial system in a haphazard fashion, conflicting with the principles heretofore approved by this Court. This is, indeed, a case in which the decision below "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a course by a lower court, as to call for an exercise of this court's power of supervision". Supreme Court Rule 19(1)(b).

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12. Thus, although "the interest of justice" was separately discussed in *Van Dusen v. Barrack*, 376 U. S. 612 (1964), it was considered as a further limitation upon a transfer to a forum otherwise more convenient for parties and witnesses.

II. The Decision Below Conflicts With Decisions of This Court.

The transfer of these civil actions without a finding that such transfer was "for the convenience of parties and witnesses", and, indeed, contrary to that convenience, conflicts with the decisions of this Court. See, e.g., *Ex parte Collett*, 337 U. S. 55 (1949); *United States v. National City Lines*, 337 U. S. 78 (1949); *Norwood v. Kirkpatrick*, 349 U. S. 29 (1955).

III. The Decision of the Court of Appeals Refusing to Issue the Writ of Mandamus Conflicts With Decisions of This Court.

When the district court exceeds its statutory authority and jurisdiction by directing the transfer of civil actions properly before it in circumstances which do not permit a finding that such transfers are "for the convenience of parties and witnesses" as § 1404(a) requires, and then denies a certificate permitting an interlocutory appeal under § 1292(b) of the Judicial Code, the litigants are deprived of any effective remedy for the district court's action, no matter how arbitrary or illegal it may be, unless a writ of mandamus is issued by an appellate court. The litigant is summarily denied its rights and privileges under the statutes prescribing venue with the concomitant frustration of the important public policies so expressed by Congress. This is particularly so where there is the publicly announced, advance agreement of the transferee court to accept the cases, which diminishes the likelihood of, or even precludes, a free and fresh reconsideration of the matter after transfer. Compare *Hoffman v. Blaski*, 363 U. S. 335 (1960).

The refusal of the court of appeals to issue the writ of mandamus conflicts with the decisions of this Court that mandamus is the proper remedy to correct errors in the

interpretation of the legal limitations upon and the criteria for a transfer under § 1404(a), *Van Dusen v. Barrack*, 376 U. S. 612, 615, n. 3 (1964), and to confine an inferior court to a lawful exercise of its authority, *Platt v. Minnesota Mining Co.*, 376 U. S. 240, 245 (1964).

CONCLUSION.

The impact of this decision upon the conduct of the business of the district courts in applying § 1404(a) to related, multiple district litigation is substantial. If transfers may be made in such cases in disregard of the "convenience of parties and witnesses" and contrary to the clear and unambiguous language of the statute, this Court should so state lest there be confusion and non-uniform employment of this important procedural device, particularly since the decision below conflicts with the plain words of the statute and unsettles the law as heretofore announced by this Court.

Respectfully submitted,

PHILIP PRICE,
RAYMOND W. MIDGETT, JR.,
RICHARD G. SCHNEIDER,
Attorneys for Petitioner I-T-E Circuit Breaker Company.

April 15, 1965.

APPENDIX A.

List of Respondents.

City of Philadelphia
City of Philadelphia as owner and
The United Gas Improvement Company
as manager of the property known
as The Philadelphia Gas Works
Philadelphia Electric Company
Harvey's Lake Light Company
The United Gas Improvement Company
City of Willmar, Minnesota
Western Farmers Electric Cooperative
Moon Lake Electric Association, Inc.
Blue Ridge Electric Membership Corp.
Yampa Valley Electric Association, Inc.
Menard Electric Cooperative
Jones-Onslow Electric Membership Corp.
Washington Electric Cooperative, Inc.
Corn Belt Power Cooperative
Randolph Electric Membership Corp.
Wake Electric Cooperative
City of Spencer, Iowa
Trustees of Spencer Municipal Utilities
Webster City, Iowa
The City of Greenwood, Mississippi
Greenwood Utilities Commission
City of Lansing, Michigan
City of Holland, Michigan

City of Detroit, Michigan
The City of Orlando, Florida
Orlando Utilities Commission
City of Pittsburgh
City of Clarksdale, Mississippi
City of Fort Pierce, Florida
City of Rochester, Minnesota
Bihar State Electricity Board
Damodar Valley Corporation

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CITY OF PHILADELPHIA, et al.	CIVIL ACTION NOS.	
	29810	30890
v.	29817	30907
	30017	30913
FEDERAL PACIFIC ELECTRIC COMPANY	30821	30936
	30829	30950
and	30851	30955
	30868	30958
I-T-E CIRCUIT BREAKER COMPANY,	30878	30968
Defendants.	30885	

(POWER SWITCHGEAR ASSEMBLY CASES)

ORDER TO SHOW CAUSE.

AND NOW, to wit, this 9th day of February, 1965, it appearing that all of the cases in the above category in this District have been settled as against every defendant except Federal Pacific Electric Company and I-T-E Circuit Breaker Company, and it further appearing that several cases involving this category have been set for trial in the Northern District of Illinois for May 1, 1965, and that it would facilitate the national disposition of these cases to transfer them to the Northern District of Illinois to be either consolidated with the cases there set for trial or for trial immediately thereafter, and the Court having ascertained that the United States District Court for the Northern District of Illinois is agreeable to such transfer,

IT IS NOW ORDERED, ADJUDGED AND DECREED that all plaintiffs and the above named defendants show cause, if any they have, why the above entitled actions should not be so transferred to the Northern District of Illinois.

Rule returnable on Friday, February 19, 1965, at 11 A. M., before the Honorable Joseph S. Lord, III, Judge of this Court.

Plaintiffs' and defendants' replies and briefs in support of their positions shall be filed with the Clerk of the Court not later than 4:30 P. M., Wednesday, February 17, 1965, and copies thereof concurrently filed with Judge Lord.

By THE COURT:

/s/ THOMAS J. CLARY,
Ch. J.

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

	CIVIL ACTION NOS.	
CITY OF PHILADELPHIA, et al.	29810	30890
v.	29817	30907
	30017	30913
FEDERAL PACIFIC ELECTRIC COMPANY	30821	30936
	30829	30950
and	30851	30955
	30868	30958
I-T-E CIRCUIT BREAKER COMPANY,	30878	30968
Defendants.	30885	

ORDER.

AND NOW, to wit, this 23rd day of February, 1965, it appearing that all of the cases involving power switch gear assemblies have been settled as against every defendant except Federal Pacific Electric Company and I-T-E Circuit Breaker Company, and it further appearing that several cases involving this category have been set for trial in the Northern District of Illinois for May 3, 1965, and that it would facilitate the national disposition of these cases to transfer them to the Northern District of Illinois to be either consolidated with the cases there set for trial or for trial immediately thereafter, and it further appearing, after the filing of briefs and after argument heard thereon, that it is in the interest of justice that said cases be transferred to the United States District Court for the Northern District of Illinois, and the Court having ascertained that the United States District Court for the North-

ern District of Illinois is agreeable to such transfer, IT IS ORDERED that the above cases be and they hereby are transferred to the United States District Court for the Northern District of Illinois.

By THE COURT

/s/ JOSEPH S. LORD, III,
J.

APPENDIX D.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 15,300.

I-T-E CIRCUIT BREAKER COMPANY,
Petitioner,

v.

CITY OF PHILADELPHIA, CITY OF PHILADELPHIA AS OWNER AND THE UNITED GAS IMPROVEMENT COMPANY AS MANAGER OF THE PROPERTY KNOWN AS THE PHILADELPHIA GAS WORKS, PHILADELPHIA ELECTRIC COMPANY, THE UNITED GAS IMPROVEMENT COMPANY, ET AL.,
Respondents,

AND

HONORABLE JOSEPH S. LORD, III, DISTRICT JUDGE,
Respondent.

Present: MCLAUGHLIN, HASTIE and SMITH, *Circuit Judges.*

On Petition, &c.

ORDER.

After full consideration of the petition for either a rule to show cause or writ of mandamus and the answer thereto, the said petition is denied.

By THE COURT,

MCLAUGHLIN,
Circuit Judge.

Dated: March 26, 1965.

Office-Supreme Court, U.S.
FILED
MAY 12 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964.

No. 1068.

I-T-E CIRCUIT BREAKER COMPANY,
Petitioner,

v.

CITY OF PHILADELPHIA, et al.,
and
HONORABLE JOSEPH S. LORD, III, District Judge,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS OTHER THAN HON. JOSEPH S. LORD, III IN OPPOSITION.

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INDEX.

	Page
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT	4
CONCLUSION	6
APPENDIX A—Excerpts From Transcript of Hearing February 19, 1965 Before the United States District Court for the Eastern District of Pennsylvania	9

TABLE OF CASES CITED.

	Page
A. B. Chance Co. v. Atlantic City Electric Company, 10 L. ed. 2d 122, 83 S. Ct. 964	4
Aircraft Marine Products, Inc. v. Burndy Engineering Co., 96 F. Supp. 588 (S. D. Cal. 1951)	6
Bankers Life & Cas. Co. v. Holland, 346 U. S. 379	4
Continental Grain Company v. Barge FBL—585, 364 U. S. 19	5, 6
Ex parte Fahey, 332 U. S. 258	4
Federal Pacific Electric Company v. Kansas City, 373 U. S. 914	4
General Electric Company v. Atlantic City Electric Company, 373 U. S. 909	4
General Electric Company v. Honorable William H. Kirkpatrick, 372 U. S. 943	4
General Electric Company v. Public Service Company of New Mexico, 374 U. S. 809	4
Illinois v. Commonwealth Edison Co., 375 U. S. 834	4
I-T-E Circuit Breaker Co. v. Becker, 1965 Trade Cases ¶ 71,406	3
Parr v. United States, 351 U. S. 513	5
Pennsylvania Public Utility Commission v. Westinghouse Electric Company, 372 U. S. 936	4
Roberts v. Kurtz, 236 F. Supp. 471 (D. N. J. 1964)	6
Roche v. Evaporated Milk Association, 319 U. S. 21	4
Rodgers v. Northwest Airlines, Inc., 202 F. Supp. 309 (S. D. N. Y. 1962)	6
Swindell-Dressler Corp. v. Dumbauld, 308 F. 2d 267 (3rd Cir. 1962)	4
Van Dusen v. Barrack, 376 U. S. 612	6
Winsor v. United Air Lines, 153 F. Supp. 244 (E. D. N. Y. 1957)	6

STATUTES AND RULES CITED.

	Page
Federal Rules of Civil Procedure, Rule 52(a)	5
Sherman Act, Section 1, 15 U. S. C. § 1	2
28 U. S. C. 1292(b)	5
28 U. S. C. § 1404(a)	2, 6

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 1068.

I-T-E CIRCUIT BREAKER COMPANY,
Petitioner,

v.

CITY OF PHILADELPHIA, ET AL.,

and

HONORABLE JOSEPH S. LORD, III, DISTRICT JUDGE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS OTHER THAN HON. JOSEPH S. LORD, III IN OPPOSITION.

QUESTION PRESENTED.

Did the Court of Appeals err in refusing to review, by the extraordinary Writ of Mandamus or by a Rule to Show Cause, the interlocutory order of the District Court transferring related electrical equipment antitrust actions to another district in which there were pending other related actions arising out of the same conspiracy and part of the same National Discovery Program, where the District Court's order was made after submission of briefs, affidavits and after hearing at which the plaintiffs supported the transfer as being for the convenience of the parties and witnesses and in the interests of justice?

STATEMENT OF THE CASE.

The actions transferred by the United States District Court for the Eastern District of Pennsylvania were filed by the various respondents in the period from June 23, 1961 to February 5, 1962, and alleged that five defendants, including petitioner I-T-E Circuit Breaker Company, were engaged in a conspiracy to violate the antitrust laws in violation of Section 1 of the Sherman Act, 15 U. S. C. § 1, with respect to power switchgear assemblies. Pursuant to the National Discovery Program in the electrical equipment antitrust cases, the Coordinating Committee for Multiple Litigation of the United States District Courts, appointed by Chief Justice Warren in January, 1962, recommended a series of national discovery orders which were entered in the Eastern District of Pennsylvania and approximately thirty other Districts in which related actions were pending, including the Northern District of Illinois. Documents relating to power switchgear assemblies were produced by defendants, including I-T-E, at the defendants' national depository in Chicago. I-T-E admits that file drawers of its documents relating to these cases are now in Chicago (27a [1]). Intensive preparation for the trial of a power switchgear assembly case has been proceeding in the Northern District of Illinois. Cases involving other product lines have been tried in the Eastern District of Pennsylvania and elsewhere.

Plaintiffs did not oppose the entry of the transfer order, and on the contrary, at the hearing before the District Court on February 19, presented numerous arguments why the proposed transfer met the statutory criteria of 28 U. S. C. § 1404(a) as being "for the convenience of parties and witnesses, in the interest of justice". Plaintiffs argued that the time of counsel and witnesses would

1. References to "a" pages are to the appendices to the Petition for either a Rule to Show Cause or a Writ of Mandamus in the Court of Appeals filed by petitioner as the record herein.

be saved by consolidating discovery with the actions pending in Chicago and that transfer would make possible a consolidated trial procedure at least on the issue of liability which would be in the interest of justice. (Appendix A to this Answer.)

Two power switchgear assembly cases were similarly transferred to the Northern District of Illinois by order of the United States District Court for the Western District of Missouri (28a) and I-T-E's Application for a Writ of Mandamus to the United States Court of Appeals for the Eighth Circuit was denied by that Court on March 29, 1965, with an accompanying opinion in which the Court found that the transfer satisfied the statutory requirements.[2] Other transfers have also been made from the Southern District of Texas and the Western District of Kentucky.

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2. As the Court of Appeals for the Eighth Circuit commented, "What it [petitioner] seemingly wants done is simply to have all the [581] suits against it left alone." *I-T-E Circuit Breaker Co. v. Becker,* 1965 Trade Cases ¶ 71,406.

ARGUMENT.

Since the institution of the civil antitrust suits arising out of the electrical equipment cases, there have been at least seven Petitions for Certiorari presented to and denied by this Court with respect to interlocutory orders involving the discretion of the District Courts.[3]

Where the District Court had jurisdiction over the subject matter and the parties, mandamus does not lie to review a decision of the lower Court transferring an action to another district even if the decision of the lower court were to involve an erroneous construction of the law. *Bankers Life & Cas. Co. v. Holland,* 346 U. S. 379. The writ is not to be used as a substitute for appeal. *Ex parte Fahey,* 332 U. S. 258, 259-260. Although a party may claim hardship in being compelled to proceed to trial in advance of a review of the court's action, this does not justify issuance of the writ of mandamus. *Roche v. Evaporated Milk Association,* 319 U. S. 21, 31.

Petitioner does not contend it has been denied procedural due process by absence of notice, hearing, or the opportunity to be heard, such as justified mandamus in *Swindell-Dressler Corp. v. Dumbauld,* 308 F. 2d 267 (3rd Cir. 1962). On the contrary, it is evident that the petitioner was afforded the fullest opportunity to present its contentions in an adversary proceeding in which the re-

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3. *Pennsylvania Public Utility Commission v. Westinghouse Electric Company,* cert. denied March 4, 1963, 372 U. S. 936; *General Electric Company v. Honorable William H. Kirkpatrick,* cert. denied March 18, 1963, 372 U. S. 943; *A. B. Chance Co. v. Atlantic City Electric Company,* stay pending certiorari denied April 10, 1963, 10 L. ed. 2d 122, 83 S. Ct. 964; *General Electric Company v. Atlantic City Electric Company,* cert. denied May 13, 1963, 373 U. S. 909; *Federal Pacific Electric Company v. Kansas City,* cert. denied May 13, 1963, 373 U. S. 914; *General Electric Company v. Public Service Company of New Mexico,* cert. denied June 10, 1963, 374 U. S. 809; *Illinois v. Commonwealth Edison Co.,* cert. denied Oct. 14, 1963, 375 U. S. 834.

spondents similarly presented the reasons supporting transfer. Nor does or can petitioner deny that the Northern District of Illinois is a district in which the action might have been brought. Basically petitioner's complaint is only that it disagrees with the conclusion reached by the District Court after the hearing at which the opposing views were presented and it seeks to have this Court substitute its judgment or to require the Court of Appeals to substitute its judgment for the discretionary action taken by the District Court Judge before whom the parties had presented all of the relevant factors.

Such an interpretation would make every transfer order the subject of interlocutory review and would frustrate the congressional policy against piecemeal appeals. *Parr v. United States*, 351 U. S. 513, 520-21.[4]

I-T-E's contention that the transfer order is fatally defective because of the absence from the Court's order of the magic words "for the convenience of parties and witnesses" is patently trivial. There is no requirement that the District Court parrot by rote the statutory language, and the statutory requirements have been amply satisfied when the Court gives the parties the opportunity to present their opposing viewpoints which it then considers in exercising its discretion. The District Court is under no obligation to make any findings of fact or conclusions of law in connection with a motion to transfer (Federal Rules of Civil Procedure, Rule 52(a)), and in the absence of persuasive evidence to the contrary, the appellate courts cannot assume the District Court failed to exercise its discretion in accordance with the statutory requirements.

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4. In the extraordinary case in which an interlocutory appeal from an order granting or denying transfer is appropriate, the Interlocutory Appeals Act would provide a remedy. 28 U. S. C. 1292(b). This was the appellate route followed in *Continental Grain Co. v. Barge FBL-585*, 364 U. S. 19. The District Court in this case determined that this was not such an appropriate case and denied certification. The new Rule to Show Cause procedure referred to in the alternative by petitioner is merely a substitute for mandamus; thus the same criteria would apply.

In any event, the record clearly justifies the action of the District Court. Section 1404(a) was designed to prevent "the wastefulness of time, energy and money" that accompanies the simultaneous pending in two District Courts of two cases involving precisely the same issues. *Continental Grain Company v. Barge FBL—585,* 364 U. S. 19, 26. Substantially the same witnesses must be called in the determination of liability for all power switchgear assembly claims and consolidated discovery or consolidated trial on liability would protect litigants, witnesses and the public against unnecessary inconvenience and expense.

Many Courts have held that the pendency of a similar action in another District Court is a factor in supporting transfer of the action under Section 1404(a).[5] Section 1404(a) can be regarded as a federal judicial housekeeping measure which is intended to authorize a change of courtrooms on the basis of convenience and fairness. *Van Dusen v. Barrack,* 376 U. S. 612, 636-637.

There is no authority in this Court which would preclude transfer to another district when some of the parties to the action contend that they, the witnesses and the courts will be convenienced by such an order, and the record supports that contention and patently discloses that such a move is in the interests of wise judicial economy. Such a transfer is in accordance with the remedial intent of Section 1404(a). *Continental Grain Co. v. Barge FBL—585,* 364 U. S. 19.

CONCLUSION.

It is precisely because the order below is only one facet of the most complex multiple district litigation to reach the federal courts that interlocutory review should be denied.

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5. *Roberts v. Kurtz,* 236 F. Supp. 471 (D. N. J. 1964); *Rodgers v. Northwest Airlines, Inc.,* 202 F. Supp. 309, 312 (S. D. N. Y. 1962); *Winsor v. United Air Lines,* 153 F. Supp. 244 (E. D. N. Y. 1957); *Aircraft Marine Products, Inc. v. Burndy Engineering Co.,* 96 F. Supp. 588, 593 (S. D. Cal. 1951).

The district judges, aided by the Coordinating Committee for Multiple Litigation, have performed a strikingly successful task of coordinating the pre-trial procedures so that the entire federal judicial system has avoided the entanglements in which more than 1800 electrical equipment treble damage suits could have been enmeshed. Review at this stage of the litigation would only encourage a deluge of other applications to the appellate courts by each party claiming to be aggrieved by some discretionary order of the district court. The transfer of the cases was within the power of the District Court, which exercised its discretion in accordance with the clear language of the statute and precedents of this Court.

For the foregoing reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

Excerpts From Transcript of Hearing February 19, 1965 Before the United States District Court for the Eastern District of Pennsylvania.

(19)

Mr. Kohn: If Your Honor please, in view of Mr. Price's presentation I do feel obliged to say a few things on this record in favor of this proposed transfer.

We certainly don't favor any Castro technique for the administration of justice or what is euphemistically called justice.

(20)

On the other hand, there is another extreme which can be just as bad and I think in a sense what Mr. Price would urge upon you is that other extreme.

Now, I don't see how anybody can seriously say that it is not in the interest of justice, that it is not for the convenience of the parties and witnesses, to have one trial of the same issue instead of seventeen or 117 trials of the same issue.

Why should the same witnesses be taken to Chicago and be taken to Philadelphia? Why should people have to go through the same thing twice, seventeen times or 117 times?

It is certainly to the manifest interest of his own client to have his own witnesses heard just once instead of again and again and again. Do we have to sit in courts everywhere in the United States and spend three weeks or three months reading depositions into the record again and again and again?

We had the same experience in the power transformer case, for example. We went through two and a half months more of it here. Then some poor fellow in Kansas City

had to go through the same thing all over again with the same result. How could anybody possibly argue that anybody was convenienced by that procedure or that anything in the

(21)

interest of the administration of justice was acomplished, so I think manifestly right on the face of it there is no clearer situation for a transfer in the interest of the administration of justice.

Certainly these people, these people representing these same defendants, when they think they can drag some poor widow whose husband was killed in an airline crash to some other city, they don't hesitate to say that it is in the interest of justice there to have one trial, but here where they have plaintiffs who are capable of conducting the case in a joint fashion in some other city, then they become violently opposed to it.

Now, there is going to be no great confusion out there. I don't see why, for example, there cannot be a single trial on the issue of liability as we have proposed in our memorandum, and I think actually there may never be an occasion for any trial because if this case is transferred we would propose to file a motion for summary judgment on the issue of liability, because I think certainly having had these cases tried now and similar cases tried in three or four different places now, with a uniform result, and having seen what happens, I think it is just a burden on the judicial system of this country to go through another three or four months' trial when the result is a foregone conclusion

(22)

and the record in this case, when these people themselves, I-T-E, say there was a conspiracy, that they were coerced into. Well, coerced or uncoerced there was a conspiracy and just as in the airplane crash case there was here one product, one conspiracy and a number of plaintiffs.

You will remember, for example, in the power transformer case the bulk of their evidence wasn't confined to Philadelphia. They had these laborious charts that kept on crowning Mr. Sawyer and myself, you remember, which contained purchases by everybody all over the country, sales. I mean they talk about the tremendous volume of paper they are going to have, the tremendous number of sales they will have to keep track of. You remember, they had sales not only from the defendants in that case to the plaintiffs in that case, but by the defendants in that case to all purchasers and by other manufacturers.

You will remember, they even had the sales by European manufacturers contained in the data which was on those charts, sales to people who weren't even involved in the remotest way in that case.

You will remember the National Analyst run that they had, that tremendous mass of data that we fought to get and finally got at the very end of the case in which they had sales by these defendants to everybody in the country.

(23)

So I don't think they simplify anything by chopping this up and causing confusion not in one court but confusion in two or more courts.

Now, just one or two other matters. I don't see what the relevance is of the reference in Mr. Judson's affidavit supplied by Mr. Price to certain conflicts which he refers to between the public and private power segments of the electric industry, but whatever conflicts there may be on those issues we are all agreed, and I think the facts sustain our argument, that there was a conspiracy in which public and private power producers alike were defrauded by these people, and all we want is, in the shortest, most expeditious manner, to get back what one of my clients has referred to as the ill-gotten gains which these defendants have obtained from us.

Then finally he includes a reference to the fact that Commonwealth Edison, PE, and certain other companies have made certain amounts of money or have certain revenues. I was under the impression that rich or poor, you had a right to get justice in the courts of the United States, and it was of no moment that a particular plaintiff was solvent. If we are going to engage in that sort of irrelevancy I would simply like to submit for this record, since it has been opened by the defendant, a series of clippings from the local

(24)

papers, supplied to them, I have no doubt, by the defendants, in which they talk about I-T-E's tremendous profit spurt in the last year and the increase of their dividends, and I think perhaps the record will then be completely irrelevant, both from him and myself.

(Photostatic copy of newspaper clippings marked Plaintiffs' Exhibit A for identification.)

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(25)

Seriously, the judges of the United States have made the first two, what I call tentative steps toward an efficient administration of the multiple litigation problem, first in the national discovery and now in this move, and I think it would be a horribly retrogressive step if the judges, having gone forward this far, would now withdraw and step back and not have this kind of transfer and endeavor to dispose of these cases at one time.

(26)

My opposition, such as it has been throughout to this national discovery program or to transfer, has always been on the basis of the fact that there would be delays because

all of these people trying to get together would be unable to agree on dates, things would be postponed, and I could move my own cases along faster. I still think I could probably do that, but whether I can move my cases along is not the sole criterion. There is a much more important problem, whether all the cases could be moved along, and I think this certainly was manifested by what ultimately happened in the national discovery. It moved all those cases along a good deal faster, and if we could take national depositions involving hundreds of plaintiffs, and those depositions are the guts of the trial, there is no reason to disperse that which was done in a uniform fashion and take those national depositions and introduce them in two, three, four or seventeen places.

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REPLY BRIEF FOR PETITIONER.

Respondents' brief in opposition does not meet the issue presented by the petitioner. Respondents have not dealt with and apparently do not dispute petitioner's contention that § 1404(a) of the Judicial Code, 28 U. S. C., authorizes transfer only "for the convenience of parties and witnesses" and not merely upon a finding that "the interest of justice" will be served. Instead, respondents have assumed the burden of justifying the transfers under traditional standards, a burden which the district judge did not even attempt to carry.

Respondents' brief states at page 5 that:

> ". . . petitioner's complaint is only that it disagrees with the conclusion reached by the District Court after the hearing at which the opposing views were presented and it seeks to have this Court substitute its judgment . . . for the discretionary action taken by the District Court Judge. . . ."

This statement misrepresents the petitioner's position. Petitioner's complaint is that the district judge ignored the basic requirement of 28 U. S. C. § 1404(a) that a transfer shall be "for the convenience of parties and witnesses"; and that the essential facts properly before him did not furnish a legal basis for the exercise of discretion within the area authorized by the statute. See pages 7 to 9 of the petition. Nor does petitioner contend, as respondents suggest (respondents' brief, p. 5), that the district court must "parrot by rote" the statutory language. The district court must demonstrate that there is a legal basis for exercising its authority to depart from its conventional obligation to dispose of its own cases. As the Court said in *Continental Grain Co. v. Barge FBL-585,* 364 U. S. 19, 26, "the trial judge can, *after findings,* transfer the whole action to the more convenient court." (Emphasis supplied.)

An assertion by counsel, contrary to the only factual data in the record, that "some of the parties to the action contend that they, the witnesses and the courts will be convenienced by such an order" (see respondents' brief, p. 6) is not sufficient to support an order of transfer. The absence of statutory or other proper authority for a transfer makes its attempt such an abuse of judicial power as this Court has held to be a proper subject of immediate correction.

A fundamental premise of the respondents' argument is that "precisely the same issues" are involved in the Philadelphia cases as in the cases pending in Chicago

(respondents' brief, p. 6). This simply is not so. The facts relating to the existence and conduct of the alleged conspiracy may be more or less similar for the various purchasers who claim to have been injured by the conspiracy, but there can be no liability to a particular purchaser unless it can demonstrate that the alleged conspiracy had some impact upon it. This issue, as well as issues relating to the damages suffered, if any, depend on each purchaser's peculiar circumstances, its particular relationship with the defendant and the facts surrounding its specific purchases. Thus the issues involved in the Chicago cases relate to the particular circumstances of the purchasers who have sued in Chicago, whereas the issues involved in the Philadelphia cases relate to the particular circumstances of the purchasers who have sued there.

The coordinated pre-trial procedures instituted under the guidance of the Coordinating Committee for Multiple Litigation recognized for purposes of discovery the distinction between the conduct of the alleged conspiracy and the consequences of the alleged conspiracy for individual plaintiffs. Thus, consideration of separate transactions and specific damage questions inherent in the present stages of the litigation was excluded from the coordinated national discovery program. Such matters were treated as "local" and not susceptible of mass development. They cannot, as a practical matter, be consolidated, and attempting to do so for transactions which occurred in far distant localities, and which were handled by quite different people for wholly unrelated purchasers, cannot fail to add greatly to the confusion, expense and difficulty of disposing of the cases, both in the present pre-trial and in the trial stages. Indeed, this was undoubtedly a reason why, throughout the "national program," the Coordinating Committee always said it was advisory and the several jurisdictions in which the individual cases were pending were left with the separate responsibility for ultimately disposing of the cases pending before them.

Respondents have referred (respondents' brief, p. 3, n. 2) to a statement made by the Court of Appeals for the Eighth Circuit in *I-T-E Circuit Breaker Co. v. Becker*, 1965 Trade Cases ¶ 71,406, to the effect that what petitioner ". . . seemingly wants done is simply to have all the suits against it left alone." This is incorrect. Petitioner does not ask that its suits be ignored, but merely that they be disposed of according to law in the jurisdictions in which they were brought. Under the law, these cases should remain in the jurisdictions originally selected by the plaintiffs, where by far the largest part of the transactions involved have occurred, where necessary witnesses are subject to subpoena and where preparation and trial of the several cases can be conducted most conveniently, economically and expeditiously.

Section 1404(a), the decisions applying it, and its legislative history, make it clear that convenience of parties and witnesses is fundamental to the exercise of the authority granted by the statute. A district court is not authorized to relieve itself of its own statutory obligation to try cases brought before it by transferring such cases to other remote jurisdictions by the simple expedient of announcing that such a transfer is "in the interest of justice." Such a novel departure by a district court from established law should not be sanctioned without a full consideration by this Court. Petitioner therefore requests that its petition for writ of certiorari be granted.

Respectfully submitted,

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May 17, 1965.